FILE DATE
JUN 20 2006

No. 05-1568

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In The
SUPREME COURT OF THE UNITED STATES

*****

DOUG DRETKE, Petitioner

V.

ANTHONY GRAVES, Respondent

*****

RESPONDENT'S BRIEF IN OPPOSITION

****

(THIS IS A CAPITAL CASE)

****

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THIS IS A CAPITAL CASE

ISSUES PRESENTED

ISSUE NUMBER 1

1. Whether the court below erred in determining that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Robert Carter claimed to have committed the murders alone.

ISSUE NUMBER 2

2. Whether Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose Carter's statements that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

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Issue No. 2. - Whether Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose Carter's statements that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

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RESPONDENT'S BRIEF IN OPPOSITION

TO

CERTIORARI

Respondent ANTHONY GRAVES respectfully submits his Brief In Opposition to certiorari being granted, pursuant to Supreme Court Rule 15 (1), asking the Court deny this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent Graves was convicted of capital murder and sentenced to death in October, 1994, in the 23rd District Court of Brazoria County, Texas, on a change of venue from the 21st District Court of Burleson County, Texas. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals (CCA). *Graves v. State*, No. 72,042 (Tex. Crim. App. 1997) (unpublished).

Graves' initial state application for writ of habeas corpus was denied by the CCA, with three judges dissenting. *Ex parte Graves*, ___ S.W. 2d ___ (Tex. Crim. App, No. 40,812, 1999) (unpublished). Two successor habeas actions, with amendments, were filed in state court, raising additional claims, with the Texas CCA granting review of one successor issue, eventually denying relief on that claim, with three judges dissenting. See *Ex Parte Graves*, 70 S. W. 3d 103 (2000). The remaining claims were

dismissed. *Ex parte Graves*, No. 40,812-2 (Tex. Crim. App. 1999); *Ex parte Graves*, No. 40,812-3 (Tex. Crim. App. 2000).

Graves filed his Section 2254 petition for writ of habeas corpus in the United States District Court, raising nine habeas corpus claims. ROA, pages 345, et seq. The District Court summarily denied relief and denied a COA. *Graves v. Dretke*, (S.D. Tex. No. G-00-221, Sep. 6, 2002) (unpublished).

On appeal of that ruling, the Fifth Circuit granted Graves' application for a Certificate Of Appealability (COA) on one of the *Brady* claims and remanded the claim to the district court for an evidentiary hearing, but denied the COA on the other issues. *Graves v. Dretke*, 351 F.3d 143 (5th Cir. Aug. 15, 2003). Graves filed a Motion For Rehearing, which resulted in the Fifth Circuit granting the rehearing as to one additional *Brady* claim, and also remanding that claim for an evidentiary hearing. *Graves v. Dretke*, 351 F.3d 156 (5th Cir. Nov. 13, 2003).

While the case was pending the scheduling of the evidentiary hearing, Graves sought a Writ Of Certiorari to the United States Supreme Court concerning the issues that had been rejected of the Fifth Circuit, but certiorari was subsequently denied. See *Graves v. Dretke*, ___ U.S. ___ (No. 03-8878, 2004).

In September, 2004, the evidentiary hearing on remand was conducted, and thereafter, the United States Magistrate issued a report

denying relief. ROA, pages 1554-73. Appellant filed voluminous Objections to the Magistrate's recommendation, ROA, pages 1584-1681, but the District Court adopted the Magistrate's findings. *Graves v. Dretke*, No. G-00-221 (S.D. Tex. Feb. 16, 2005) (unpublished). ROA, pages 1682-88. The District Court granted a Certificate Of Appealability and upon subsequent appeal to the Fifth Circuit, after briefing and oral argument, the Court of Appeals ordered a new trial. See *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006). The Texas Attorney General's office sought a stay of the Court of Appeals mandate, which was granted until April 24, 2006; however, no Motion For Rehearing was filed in the Court of Appeals.

The United States District Court has ordered the State of Texas to retry the Respondent and under the present amended scheduling order, such trial must commence on or before September 12, 2006. However, this certiorari petition was filed on May 31, 2006, and the Texas Attorney General's office is presently requesting that the United States District Court again delay the trial setting in this matter.

B. Facts Of The Case

While Petitioner cites the opinion of the Texas Court of Criminal Appeals' decision affirming the direct appeal in Respondent's case for factual support underlying their claims, Respondent would note that the subsequent years have reflected *other evidence* undermining the reliability of the original Court of Criminal Appeals' decision.

The only evidence that placed Graves at the crime scene was the testimony of Robert Carter, the self-confessed killer of the victims. District Attorney Sebesta has agreed that the state's entire case was based solely on Robert Carter's testimony, and therefore the credibility of Carter's testimony was critically necessary to sustaining the verdict against Graves. There was no other eyewitness testimony, fingerprints, DNA or other scientific evidence directly implicated Graves. S.F. Vol. 38:3749-50.

In addition to the *Brady* claims which resulted in the Fifth Circuit granting relief in this case, subsequent evidence produced reflected that shortly after Graves' conviction, Carter began informing other people that his trial testimony had been false, admitting that he committed the murders alone and that Graves was not present at the crime scene. Carter confessed his perjured testimony to his appellate attorney, Mary Hennessy, his federal habeas counsel, Bill Whitehurst; Graves' state habeas counsel, Patrick McCann; Graves' present federal habeas counsel Roy Greenwood; at least two other prison inmates, Alvin Kelly and Kerry Max Cook, and to his "second mother," Marilyn Adkinson, all who provided affidavits. See *Graves v. Cockrell*, No. G-00-221, *13 (S.D. Tex. Sep. 6, 2002) (unpublished). It was also brought to light that Carter had not informed his trial attorney, Dain Whitworth, in the two years that Whitworth represented Carter, that Graves was a participant in the murders. *Id.* at *14. See Habeas Exhibits Nos. 3, 6, 7, 8, 9 and 10, ROA Volume 3.

Further, as part of the federal habeas proceedings, a deposition to perpetuate the testimony of Robert Carter was taken on May 18, 2000, just thirteen days prior to his execution by the State on May 31, 2000. At that deposition, Carter repeatedly stated that he had told Sebesta and Ranger Coffman *that "it was all me, but you said you didn't want to hear it"*. Exhibit 1; ROA, Vol. 1:643-683. Finally, Carter also exonerated Graves in his final, "dying declaration" words prior to being executed: *"It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court."* *Graves v. Cockrell*, No. G-00-221, *14 (S.D. Tex. Sep. 6, 2002) (unpublished).

Other evidence indicated that Graves and Carter had no previous personal relationship prior to the murders, other than Carter having married Graves' cousin, Theresa "Cookie" Carter, and that after this marriage, Graves thereafter had little contact with his cousin. The alleged "motive evidence" submitted by the state, i.e., that Graves participated in the murders because he was angry that Bobbie Davis (one of the victims) had received a promotion that his mother wanted at the Brenham State School, was impeached by a number of other witnesses, including Respondent's mother and other school employees, who indicated that there were *no ill feelings* concerning any promotion decisions.

As to the evidence that Respondent's knife was *probably* the murder weapon, according to state's witness Travis County Medical Examiner Dr.

Bayardo and Texas Ranger Roger Coffman, the defense introduced substantial contradictory expert evidence questioning these conclusions. Initially, Dr. Robert Bux, Deputy Chief Medical Examiner for Bexar County, Texas, testified that the wounds suffered by the victims could have been inflicted by *any* single-edged knife with a blade at least two and one-half inches long and one-half inch wide. S.F. Vol. 41:4124. An in-court demonstration with other miscellaneous knives supported that conclusion. Furthermore, during the state habeas corpus hearing in 1998, noted forensic anthropologist Dr. Harrell Gill-King from the University of North Texas, concluded that the methods used by the Texas Rangers and Dr. Bayardo to compare the knife to the victims' skullcaps were not only "unreliable", but may also have destroyed the *original* evidence. State Habeas Hearing, Vol. 2. The knife, given to Graves by his employer several years before, was never located. Further, Robert Carter admitted that he had final possession of the knife used in the murder, claiming in prior statements and testifying that **he** disposed of the murder weapons used in the offense.

While the State had introduced testimony from three jail workers during the trial regarding purported incriminating jailhouse conversations heard over the jail intercom between Carter and Graves, such evidence was subsequently shown to have been unreliable. Of the three jail workers (Eldridge, Robertson and Beal) it was shown that *none* of them had the

ability to identify the voices of either Carter or Graves, especially over the loud jail fan, the television noise and continuous inmate racket going on in the jail facility. On direct appeal, the Court of Criminal Appeals found that because a proper foundation had not been laid for identifying Respondent's voice, the testimony of one of these jail witnesses was erroneously admitted. However, because objections had not been made as to the other two employees' testimony, the CCA concluded that any error was harmless. See *Graves v. Texas*, ___ S.W. 2d ___ (Tex. Crim. App. No. 72,042, 1997) (unpublished).

In addition to the above evidence reflecting unreliability of the state's case in chief, subsequent proceedings have showed that the defense trial presentation was flawed in a number of respects. For example, the defense's main alibi witness, Yolanda Mathis, who had testified to the grand jury that Graves was with her at his apartment in Brenham on the night of the murders, did not testify. It was discovered that just before Mathis was scheduled to testify, District Attorney Sebesta surprisingly advised the judge that Mathis was now a "suspect" in the case and could be indicted for her role in this capital murder case. As later shown by the evidence, these threats were legally and factually baseless. Some 12 years later, Mathis has *never* been questioned or charged for the Davis' family murders, or for perjury, and she continues to affirm that she was with Graves that night at his apartment. After defense counsel informed

Mathis of Sebesta's threat, Mathis became "petrified" with fear, cried, and refused to testify. S.F. Vol. 45:57-61; S.H.R. Vol. 1:19-21.

However, trial counsel failed in their responsibility to protect Respondent's rights by securing the testimony of Mathis, denying the jury this critical alibi evidence due to these invalid and baseless threats. Evidence presented at the state habeas corpus hearing reflected that Sebesta presented *three* (3) different legal theories for contending that Mathis was a "suspect" in this case, but none of them were *legally* valid under Texas law, and Sebesta's explanations were in conflict with each other.

In addition, subsequent habeas corpus records reflect that trial counsel failed to interview and call other vital alibi witnesses. It was shown that Graves' original attorney, Dick DeGuerin, had obtained a number of potential witnesses who were willing to support the alibi defense, yet were not called by trial counsel for inexplicable reasons (See E.H.T. Vol. 3, Exhibit 23 (the Dick DeGuerin Files); ROA, pages 722-746).

Thus, Respondent would submit that any analysis of the *original* Texas Court of Criminal Appeals opinion affirming the conviction must be viewed with suspicion as to its reliable determination as to any of the facts of this case.

REASONS FOR DENIAL OF CERTIORARI

Introduction

The Fifth Circuit granted relief based upon the prosecution's suppression of relevant, material and exculpatory evidence from the defense, dealing with two separate statements made by Robert Carter to prosecuting attorney Sebesta, neither of which which were disclosed to the defense.

Even though the Petitioner sets forth two separate issues presented for certiorari review, Respondent submits that those two separate issues cannot *truly* be separated for review, as the Fifth Circuit reviewed both suppressed statements in violation of the rule of *Brady v. Maryland,* 83 S.Ct. 1194 (1964), and concluded that the statements, both *individually*, and *in combination with each other*, deprived the Respondent of a fair trial. For this reason, Respondent will not attempt to segregate his arguments into the "dual claim format" presented by Petitioner.

Respondent's Reply To Certiorari Issues

It is to be immediately noted that Petitioner, at page 1, commences this Petition by stating as follows: "*The lower court's decision* ***does not conflict*** *with various state courts of last resort or United States Courts of Appeals.*" (emphasis supplied). There is no allegation that the specific mandate of any United States Supreme Court authority was violated.

Therefore, it appears that Petitioner concedes that there are no disputed questions of law, or conflicts among jurisdictions or circuits, nor any novel or unusual legal questions presented by the Court of Appeals' analysis of this case. As Respondent understands the Petitioner's concession, the Court of Appeals' analysis of this case was proper under this Court's previous decisions. See *Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *Strickler v. Greene*, 527 U.S. 263 (1999); *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Augurs*, 427 U.S. 97 (1976); *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, supra. Why then should certiorari be granted?

As witnessed by the continuous nine-year history of habeas corpus litigation in this matter, the instant case is driven by a particular, unusual and clearly *novel* set of factual circumstances, which do not fall appropriately under the normal guidelines for certiorari being granted. See *Kyles v. Whitley*, at 456 (Justice Scalia's dissenting opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas), wherein it was stated:

"The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally....be denied. *United States v. Johnston*, 268 U.S. 220, 227 (1925). That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner v. Mata*, 449 U.S. 539, 543 (1981).....We carefully considered whether the convictions and

sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately,* to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise."(emphasis supplied)

Petitioner's arguments in support of a grant of review constitutes a request for the Court to become enmeshed in a *reanalysis* of nine (9) previous years of *fact intensive* habeas corpus litigation, where the state courts of Texas completely abdicated their responsibility for appropriate habeas corpus review, requiring the Fifth Circuit Court of Appeals to properly apply the law to the facts in granting relief.

Further, the Court of Appeals' *Brady* analysis, while granting Respondent relief, did not consider the substantial evidence of *actual innocence* submitted by Respondent in this case, as the Fifth Circuit refused to consider Respondent's "freestanding" habeas claim of innocence during the original habeas review under *Herrera v. Collins*, 506 U. S. 390 (1993). See *Graves v. Dretke*, 351 F.3d 143 (5th Cir. 2003). Cf. *House v. Bell*, 547 U.S. ___ (04-8990, June 12, 2006).

In the instant case, both claims upon which habeas relief was granted went to Respondent's assertions of his actual innocence, as summarized below:

(1) Petitioner's first claim on certiorari involves a situation wherein Robert Carter *exonerated* petitioner and asserted that he committed the murders himself *alone*, but where such evidence was suppressed from the defense.

Even though Petitioner claims that Respondent's habeas attorneys "*first learned of Carter's statement, "I did it all myself," in 1998...*" (Certiorari petition, page 8), this is not quite incorrect. It is undisputed that Respondent's counsel first obtained corroboration of Carter's exculpatory statement allegedly made to District Attorney Sebesta, when Sebesta participated in several media interviews in June, 2000, admitting that Carter had made the exculpatory statement. Sebesta related during the federal evidentiary hearing that he had totally forgotten about such exculpatory statements until after Carter's testimony during the federal deposition on May 18, 2000. Such admission was clearly exculpatory, especially when made by the state's critical witness against Respondent.

(2) Petitioner's second claim on certiorari involves a situation where Carter implicated his wife, Teresa "Cookie Carter", as being a participant in the murders, also suppressed from the defense, in violation of the trial court discovery orders and contrary to Robert Carter's perjured *trial* testimony *denying* her involvement. Respondent's counsel first learned of this admission by Carter during District Attorney Sebesta's state habeas corpus evidentiary hearing testimony in November, 1998.

Petitioner claims that Carter named his wife as a participant on *only one occasion*, while *also* implicating the Respondent; however, this is also not quite correct. District Attorney Sebesta first made this admission during the state habeas hearing, and Petitioner stipulated to this *prior testimony* during the federal evidentiary hearing.

However, subsequent evidence produced on habeas corpus indicated that Carter implicated his wife on *at least one other occasion*, during a polygraph session conducted on October 21, 1994, wherein Respondent was *not mentioned* at all within the polygraph operator's interview report. Respondent's position throughout was that Sebesta's state habeas testimony constituted only a "summary" of Carter's statements made during a *six hour* interview, and was not a direct quote by Carter at any time during that session. At the time Sebesta made this "admission" during the state habeas hearing, some four years after the trial, no issue had been "joined" concerning the failure to make such disclosure, as it was only later did Respondent submit a successor habeas petition raising this claim under *Brady*. The State "stipulated" that Sebesta had given this previous testimony, but did not directly assert during the federal evidentiary hearing that such *quoted* statement from Carter was ever *actually* made, or was the only time that Carter implicated his wife.

The Court of Appeals properly reasoned that both suppressed statements had to be considered "*in combination*" with each other, under

the facts of the case, where the overwhelming evidence of Carter's intent was to attempt *to protect his wife* from prosecution, and the only way to do that was to name a *third-party* as his codefendant, which in this case was the *Respondent*.

The Court of Appeals properly concluded that the exculpatory evidence suppressed under *Brady*, *Kyles* and *Banks*, in conjunction with a showing of *additional* acts of prosecutorial misconduct, *aggravated* the harm suffered by Respondent as a result of the admitted acts of suppression, thus depriving Respondent of a fair trial. Because it is critical to recognize the impact of these additional acts of prosecutorial misconduct, the findings of the Court of Appeals should be quoted directly, to wit:

1. "Footnote[4] - District Attorney Sebesta contradicted Graves' counsel and testified at the habeas hearing that he told Graves' defense counsel Garvie of this statement outside the courtroom the morning after Carter made the statement. **The district court did not find Sebesta credible on this point."** (emphasis supplied) Slip Opinion, p.11.

2. "**Perhaps even more egregious** than District Attorney Sebesta's failure to disclose Carter's most recent statement is his deliberate trial tactic of eliciting testimony from Carter and the chief investigating officer, Ranger Coffman, that the D.A. knew was false and designed affirmatively to lead the jury to believe that Carter made no additional statement tending to exculpate Graves..... Sebesta clearly knew of the statement and used Ranger Coffman as well as Carter to present a picture of Carter's consistency in naming Graves that Sebesta **clearly knew was false**." (emphasis supplied) Slip Opinion, p.13.

3. "The state stipulated that Carter told Sebesta, "Yes, Cookie was there; yes Cookie had the hammer." This statement was also made the night before Carter testified in Graves' trial. Sebesta did not inform

Graves' counsel of this statement." (emphasis supplied) Slip Opinion, p.14.

4. "However, Sebesta's statement did not reveal or even imply that Carter gave a statement affirmatively naming Cookie as an active participant in the murders. The defense had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime." (emphasis supplied) Slip Opinion, p.15.

5. "Sebesta's response to the defense's discovery request was that "there were some names that were given" to the State, but that "[t]hey're not necessarily parties to the crime but they are people who may have - may possibly have some information on those." Sebesta's questioning of Carter at Graves' trial about Cookie's involvement also reinforced defense counsel's belief that she was involved, if at all, after the crimes were committed. (emphasis supplied) Slip Opinion, p.15.

6. "Carter's testimony was obviously different than the statement he gave Sebesta the previous night that Cookie was there and Cookie had the hammer. " (emphasis supplied) Slip Opinion, p.16.

7. "We view Sebesta's statement regarding the polygraph, his discovery responses and questioning of Carter as **misleading and a deliberate attempt to avoid disclosure of evidence** of Cookie's direct involvement. At a minimum, Sebesta's minimal disclosure was insufficient to put the defense on notice to inquire further, particularly in light of the state's discovery disclosure."(emphasis supplied) Slip Opinion, p.16.

8. "The statement regarding Cookie's direct involvement in the crime is exculpatory for several reasons." Slip Opinion, p.17.

9. "Because the state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material." (emphasis supplied) Slip Opinion, p.20.

In addition, the Court of Appeals noted how the result of Graves' trial could have been altered to Graves' *benefit*, had the acts of misconduct not occurred, to wit:

1. "If the defense had known about the statement placing Cookie at the scene and given Carter's continuing condition that he would only testify if he were not asked about Cookie's involvement, the defense could have explained every statement implicating Graves as a means of protecting Cookie. As indicated above, these statements are particularly important in this case because Graves' conviction rests almost entirely on Carter's testimony and there is no direct evidence linking him with Carter or with the murder scene other than Carter's testimony. In addition, Carter's statement that he committed the crimes alone is important as the only statement he made exculpating Graves while implicating himself. "(emphasis supplied) Slip Opinion, p.20.

2. "If the two statements had been revealed, the defense's approach could have been much different (as set forth above) and probably highly effective." (emphasis supplied) Slip Opinion , p.18.

3. "If both statements had been timely furnished to Graves, he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he acted alone was not believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie." (emphasis supplied) Slip Opinion , p. 18.

4. "If Graves had been furnished with Carter's statement, it could have provided him with an argument that those two persons were Carter and his wife rather than Carter and Graves....Also, Carter's statement, placing Cookie directly at the scene and actively involved in the murders, puts his deal with the state to testify only on the condition that he not be questioned about Cookie's involvement in a different light. It provides a stronger argument to Graves that Carter was lying about Graves involvement to save Cookie. (emphasis supplied) Slip Opinion, p.17.

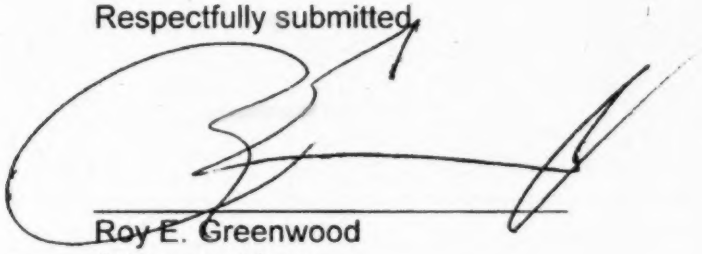
5. "Given the number of inconsistent statements Carter had given, the state faced a difficult job of persuading the jury that Carter was a credible witness, **even without the suppressed statement**. Had the defense been able to cross-examine Carter on the suppressed statement,

this may well have swayed one or more jurors to reject Carter's trial version of the events." (emphasis supplied) Slip Opinion, p.12.

The quoted findings of the Court of Appeals are clearly supported by the evidence. Respondent submits that the arguments posited by Petitioner, which constitute the exact same arguments presented to the Court of Appeals below, have been rejected in a reasonable analysis by the Fifth Circuit. Since there is no claim of any conflict of precedent, or any novel procedural question presented, Respondent requests that this certiorari petition be denied.

WHEREFORE, premises, considered, Respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and a correct copy of the above and foregoing document was served upon the Texas Attorney General's Office, by first class mail on the 20th of June, 2006.

ROY E. GREENWOOD